

IN THE HIGH COURT OF FIJI
AT SUVA
ADMIRALTY JURISDICTION

CASE NUMBER: HBG 5 OF 2008

BETWEEN: HAI SOON INTERNATIONAL TRADING PTE LIMITED
PLAINTIFF

AND: THE OWNERS OF THE MOTOR VESSEL YIN CHEN
NO.1
DEFENDANT

AND: TSAI WAN LIU
1ST INTERVENER

AND: CONSOLIDATION ENTERPRISES LTD.
2ND INTERVENER

AND: TUNA FISHING (VANUATU) CO.LTD
3RD INTERVENER

Appearances: Mr. Pillay for the Plaintiff.
Mr. Kunal Singh for the 1st and 2nd Interveners.
Mr. V. Kapadia for the 3rd Intervener.

Coram: The Hon. Justice Anjala Wati.

Date/ Place of Judgment: Monday 17th February, 2014 at Suva.

JUDGMENT

Catchwords:

Admiralty Jurisdiction- Costs of party arresting and selling vessel- costs given priority- rationale is that these costs would have been incurred in producing the fund that is for the benefit of all the claimants- Costs after the sale will not be allowed unless it is shown that it was incurred for the benefit of preserving the funds for all the claimants- costs must be on party/party basis otherwise the arresting party would be encouraged to incur costs which it would be able to claim against the fund generally- fund would be diminished disproportionately but without any particular benefit to the other parties- payment of bond-what is bond used for-incurred unreasonable security charges-Admiralty Marshal to provide security of ship to ensure that the disbursements are justified and transparent-unreasonably incurred costs cannot be allowed.

Cases Referred To:

The "Ocean Glory" [2002] 1 Lloyd's Report 679.

The Cause

1. The vessel Yin Chen No. 1 has been sold pursuant to an order of the Court. The proceeds of the sale are deposited in Court.
2. Before the money is applied in order of priority, the parties have asked me to determine the costs incurred by the plaintiff in arresting, maintaining and selling the ship.

The Plaintiff's Claim

3. The plaintiff claims that it had incurred legal fees in the sum of \$25,001.98 after the arrest of the ship and subsequent legal proceedings in respect of the sale of the ship. The plaintiff says that it also incurred costs in transporting across potential buyers to view the ship. Various bills of costs were attached to the affidavit.
4. The plaintiff further stated that it incurred a further sum of \$53,934.50 for providing security on the ship from the date of arrest until the date of sale. The schedule and receipts for payments were annexed.
5. The plaintiff says that it has priority over the sale proceeds and that a sum of \$120,000.00 should be paid out to the plaintiffs solicitors trust account.

The Objections

6. Mr. Kapadia argued that there are two different costs of the solicitors. One affidavit sworn on 3 May 2010 states that solicitors costs is \$20,344.48 and the other sworn on 12 April 2012 says that it is in the sum of \$25,001.98.
7. Mr. Kapadia argues that both the affidavits are asking for indemnity costs. He stated that indemnity costs cannot be awarded. The costs should be taxed on party/party basis. The matter must be sent to the Master for taxing of the costs.
8. In respect of the items to be taxed, the first objection was in respect of the bills presented by Neel Shivam on 5. 8.2008 and 15.10.08 in the sums of \$3,105.75 and \$12,205.37 respectively. Mr. Kapadia stated that the 2nd bill is addressed to solicitors in Singapore. Mr. Kapadia stated that the bills include the charges for arrest. The bond that has been deposited with the Admiralty Marshal is refundable. There is no information whether the Admiralty Marshal has used the money and to what extent it has been used. The bill also has payment for security charges which is claimed separately. Mr. Kapadia stated that the bond in the sum of \$2,781.25 is refundable and the security charge in the sum of \$8,644.00 is a duplication.
9. The 2nd objection was in relation to the bill of cost dated 29 April 2010 by Neel Shivam. Mr. Kapadia stated that the bill includes charges for arranging and making payments with allied security to provide security services from 1.10. 2008 to 6.12.2009 but the bill does not show any payments being made.
10. The costs are on indemnity basis. It should be on party and party basis. If disbursements are paid, the invoices should be attached. The charges are also beyond the date of sale. Mr. Kapadia also stated that this bill of cost has charged VAT twice. The disbursement includes VAT, than VAT is charged on the total sum again. Mr. Kapadia also stated that the plaintiff is charging fees for handling tenders for Ratu Tevita Uluilakeba Mara. This should go to Ratu Tevita Uluilakeba and not out of the proceeds of the sale.

11. Mr. Kapadia's third objection was on security charges. He argued that the schedule of payment by Neel Shivam states the various dates on which they made payments by cheque to Allied Security Service (Fiji) Limited. No receipts or cheque buds have been produced to verify the payments. The schedule is incorrect too. There are only two receipts by Allied Security Service (Fiji) Limited. One on 30 December 2008 and the other on 12 December 2009 in the sums of \$19,358.00 and \$34,576.50 respectively. These totals up to \$53,934.50.
12. Mr. Kapadia argued that firstly the payments to Allied Security Limited as per the schedule started on 1.7.08. Then it indicates that on various dates the payments were made by cheque. The security company would have issued the receipts for each payment and in absence of any cheque buds or receipts; it is difficult to verify any payments.
13. Moreover, Mr. Kapadia argued that the total of two receipts tally the amount in the schedule when there are flaws in the schedule itself. Mr. Kapadia identified the flaws to be as follows:-
 1. The security charges in the schedule for 12.8.08; Invoice No. 6116; NSL Cheque No. 7932 for \$1,372 is duplicated when compared with the bill of cost of 15.8. 2008 which includes security charges for 12.08.08.
 2. The payment on 26.1.2009; Invoice No. 6767; NSL Cheque No. 8865 is duplicated. It appears in the schedule twice.
 3. The invoice No. 6116 includes charges for security pass and boat fare. The charges are for 2 guards initially. Then from 9.9.08 it changes to half the figure for one guard. Mr. Kapadia argued that the charges could have been minimised if a full time security was arranged rather than part-time.
 4. There are only two receipts issued by the security company. The vessel got arrested in August 2008 and the sale was in December 2009. The receipt of 2009 is earlier in sequence numbered 30058 then the one in 2008 numbered

30065. That throws significant doubt on the authenticity of the payments. The receipts could be bought from a bookshop. Allied Security Limited would issue a tax receipt. Why would they issue receipts a year later? The schedule shows individual payments.

14. Mr Singh appearing for the 1st and 2nd interveners argued that he adapts the submissions of Mr. Kapadia and added that the receipt of Allied Security Limited has its seal but not the TIN Number. There is no cheque number and any agreement on fees. Further, the payments to Allied Security Limited would be done by clerks and not by the lawyers so the charges for attending to payments must be lower.
15. In reply to the arguments, Mr. Pillay submitted that the plaintiff's claim on the costs it incurred would rank first. The argument by the parties is on quantum. The invoice by Allied Security Limited is a collated figure. That is the account practice of Allied Security Limited. The schedule of payment has some duplication which is a typographical error. The duplicate invoices could be disregarded. The receipts of the security service have its seal so it reflects that they have received the money.
16. Mr. Pillay conceded that the transaction in the schedule on 1.7.08 is an irrelevant entry. That should be disregarded. He further argued that the costs for boat fare and security pass is necessary and incidental to the cost of maintaining the vessel. The security cannot swim to the vessel. It needs to have a boat to go to the ship and a security pass is also needed.
17. Mr. Pillay agreed that the plaintiff should not bill for handling tenders for Nguyen Thi Cam Tu and Ratu Uluilabeka Mara. He said that those bills should be directed to the respective individuals.
18. Mr. Pillay also conceded that security costs from 30 November 2009 should not be levied.

19. Mr. Pillary contended that the schedule for payment on transaction date 7.12.2007 should read 12.7. and 7.9.2007 should read 9 .7.2009.
20. Mr. Pillay averred that indeed the bond is refundable. If it is still in Court, he concedes that it should be taken off from the bill.
21. Mr. Pillay conceded that the solicitor's costs should be taxed. A scale ought to be set by the Court.

The Law and Analysis

22. The first objection is on the solicitor's bill of costs. The amount sought is \$25,001.98 which is on an indemnity basis.
23. I need to first work out the period of events. The order for arrest was made on 6.8.2008. The order for sale was granted on 24 September 2009. There definitely are costs that are involved in arresting the ship. Between arresting and sale of the vessel, cost is again involved. This cost will have to be borne out of the proceeds of the sale as the rationale is that those costs would have been incurred in producing the fund that is for the benefit of all claimants against the vessel that has been arrested and then, eventually sold. The costs incurred after the order for sale should not be paid out of the proceeds of the sale as there is no evidence that the costs were for the benefit of all claimants: The "*Ocean Glory*" [2002] 1 *Lloyd's Law Report* 679.
24. The first aspect is clear: the period of the solicitors claim. It should be between 6.8.2008 to 24.09.2009. The second is the basis of the costs: should it be on indemnity basis? My answer is in the negative. If a party who had obtained the arrest or the order for appraisalment and sale could claim all the costs thereafter (and claim priority), when the incidental result of the actions of that party had benefited all claimants, then it would simply encourage the arresting party (or the one that had obtained the order for appraisalment and sale) to incur costs

which it would be able to claim against the fund personally. That could mean that the fund would be diminished disproportionately but without any particular benefit accruing to other parties: The "*Ocean Glory*" (*Supra*).

25. The taxing of the costs therefore should be on party and party basis.
26. The third aspect arises out of the items in the bill of costs. What items are to be excluded. In my finding the items that ought to be excluded are:
- a. Any cost incurred before and after the sale.
 - b. Double VAT payments
 - c. The Bond (subject to the indication from the Admiralty Marshal on what portion has been utilised. The monies used can be allowed in the bill of costs).
 - d. Payments made to Allied Security Limited.
 - e. Costs for attending to tenders from Nguyen Thi Cam Tu and Ratu Tevita Uluilakeba Mara.
 - f. The bill of cost no. 9848 dated 10 April 2012 is to be excluded as it is for fees incurred after the order for sale of vessel.
 - g. The disbursements are to be allowed only upon production of receipts for the same.
27. The next aspect is the costs of the security charges in the sum of \$53,934.50. The schedule of payment prepared by Neel Shivam indicates that they have paid a sum of \$53,934.50 to Allied Security. The schedule indicates that payments have been made on various dates but Allied Security issues only two receipts, one on 30.12.2008 numbered 30065 in the sum of \$19,358 and the other on 20.12.2009 numbered 30058 in the sum of \$34,576.50. This collated receipt seriously casts a doubt on the authenticity of the payments made. Time and again the solicitors

had requested for individual receipts, invoices and cheque buds. None was supplied by the lawyers. If there actually was payment for this vessel then there ought to be evidence of the same.

28. Mr. Pillay has admitted that there are flaws in the schedule in that some transactions ought not to be there at all and that some transactions are duplicated. If that is the case then how do the receipts correspond to the sum total of the schedule?
29. There is clear indication that the solicitors and the security company are not transparent and honest about the true charges that have been incurred.
30. Why would the Allied Security issue a collated receipt? The accounting practice of any service provider cannot be such as contented by Mr. Pillay from the bar table.
31. Let me outline other discrepancies in the schedule based on which I say that I cannot place any reliance on the schedule and as a result on the receipts of Allied Security because it was made simply to correspond to the schedule.
32. The other discrepancies are
 - a. Transaction date 1.7.2008; Invoice number 5767, NSL Cheque No. 7701 in the sum of \$2090.

The actual invoice is attached to the affidavit of one Mohd. Saneem. The invoice is for seizer of two vehicle and storage charges. This case had nothing to do with two vehicles and storage charges. It appears that Neel Shivam Lawyers had been engaging Allied Security Limited for other task too and has billed the plaintiff for the work done for other clients.

Moreover the transaction of 1. 7. 2008 is before the order for arrest. However can those be included in the schedule of payment? My answer is in the negative.

b. There are two transactions of 26. 01.2009 in the sum of \$784.00 each.

There is a duplication of charges. Neel Shivam seems to have over paid the security company and Allied Security Limited had without any accountability accepted the same.

c. There are security charges after order for sale to one Mr. Durga Prasad was made. After the order for sale was made, there are at least 6 payments in the sum of \$728.00 each except for one payment of \$784.00. Once the order for sale was made, it was the responsibility of Mr. Durga Prasad to keep the vessel secured and not the plaintiff's responsibility. A total of \$3924 was unnecessarily paid.

33. It is improper to allow such an exorbitant sum to be paid for security only. The costs for security should have been reasonable costs. The plaintiff was given an order to arrange security for the vessel under the supervision of the Admiralty Marshal. There is no record that the Admiralty Marshal, being the Chief Registrar was consulted in regards to the security and the exorbitant charges that the company was going to charge. If the Chief Registrar knew of this, I am confident that the current security company would not have been allowed to provide the security.

34. Normally the practice is that when an order for arrest is made a bond is deposited with the Admiralty Marshal. The Admiralty Marshal uses that bond to cover its expenses such as pasting the notice of arrest, ensuring the safety of the vessel and liaising with the Ports Master. When the bond is exhausted, further sum may be requested. The Admiralty Marshal makes arrangement for the vessel's security. The reason behind the Marshal paying the costs is that there is transparency and certainty that the funds would not be misused. Instead of arranging the security under the supervision of the Admiralty Marshal, the plaintiff did what it wished and engaged a security company which charges an

exorbitant amount of money. To make it worse, the charges are not transparent and the payments made and received are incredibly inappropriate.

35. If the plaintiff was genuine in providing security of the vessel and preserving funds for the benefit of the claimants, it should have made arrangements for security under the supervision of the Admiralty Marshal and at a very reasonable sum.
36. The invoices of Allied Security Limited indicate that immediately after the arrest they had two guards at the ship at an hourly rate. Then the guards reduced to 1 later. There is no adequate reason proffered as to why two guards were necessary and why a 24 hour security was necessary. The plaintiff through the Admiralty Marshal should have made arrangements with the Ports Master for security as the Ports Master would have been served with a warrant for arrest of the ship. If there was attempt to remove the ship the Ports Master would be the first person and the one in authority to hold the removal as he had with him an order of the Court.
37. Further, a security could have been arranged on a weekly basis. In this country the security officers would be more than happy to provide security at a much lower rate.
38. The plaintiff ought to have as per the order dated 6 August 2008 provided the security for the vessel under the supervision of the Admiralty Marshal. It was the duty of the plaintiff to provide security at a reasonable sum and not to incur expenses luxuriously.
39. The charges by Allied Security are exorbitant, receipts unreliable and incredible in light of my findings. I therefore reject the Security costs incurred by the plaintiff. There is also no evidence of payment and after repeated reminders the evidence has not been filed.

40. There is no evidence why such expensive security was needed at the vessel or at all and why other quotations were not obtained for comparison. I wonder why arrangements could not be made with the Ports Master or the Chief Registrar for provision of security at a lower price.
41. There ought to be evidence of payment of boat fare and security pass. Receipts would be issued to this effect or ought to have been sought if it was to be claimed from the proceeds. I cannot allow costs to be paid willy nilly.
42. I disallow the costs paid to Allied Security Limited.

Final Orders

43. The plaintiff is entitled to have its costs taxed for the arrest and sale of the vessel between the period of 6.8.2008 and 24.09.2009. Such costs must be taxed on party and party basis by the Master of the Court.
44. The following should not be included in the taxation:
- a. Any cost incurred before and after the sale.*
 - b. Double VAT payments*
 - c. The Bond (subject to the indication from the Admiralty Marshal on what portion has been utilised. The monies used can be allowed in the bill of costs).*
 - d. Payments made to Allied Security Limited.*
 - e. Costs for attending to tenders from Nguyen Thi Cam Tu and Ratu Tevita Uluilakeba Mara.*
 - f. The bill of cost no. 9848 dated 10 April 2012 is to be excluded as it is for fees incurred after the order for sale of vessel.*

g. The disbursements are to be allowed only upon production of receipts for the same.

45. The costs paid to Allied Security Limited are refused.

46. I now send this matter to the Master for taxation after which I will, from the balance proceeds, determine the priority of payments between the claimants.

47. The Registry must assign a date before the Master.

Anjala Wati

Judge

17.02.2014

To:

1. *Mr. Pillay for the Plaintiff.*
2. *Mr. Kunal Singh for the 1st and 2nd Interveners.*
3. *Mr. V. Kapadia for the 3rd Intervener.*
4. *File: HBG 5 of 2008.*